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QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR: QUESTION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Chairman-Rapporteur: Mr. Carlos Vargas Pizarro (Costa Rica)

Chairman of the drafting group: Ms. Ann Marie Pennegard (Sweden)

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Introduction

1. The Commission on Human Rights, in its resolution 1996/37 of 19 April 1996, took note of the report of the working group on the draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (E/CN.4/1996/28 and Corr.1) and requested the working group to meet between sessions, for a period of two weeks prior to the fifty-third session of the Commission in order to continue its work, including the beginning of the second reading on the basis of the results of the first reading, with a view to the expeditious completion of a final and substantive text. The Commission also requested the working group to submit a new report to it.

2. The Economic and Social Council, in its resolution 1996/22 of 23 July 1996 authorized an open-ended working group of the Commission to meet for a period of two weeks prior to its fifty-third session.

3. Consequently, the working group held its fifth session from 14 to 25 October 1996. It was opened by the High Commissioner for Human Rights, Mr. José Ayala-Lasso, who made an introductory statement.

I. ORGANIZATION OF THE SESSION

A. Election of officers

4. At its 1st meeting, on 14 October 1996, the working group elected Mr. Carlos Vargas Pizarro (Costa Rica) as Chairman-Rapporteur. On his proposal Ms. Ann Marie Pennegard (Sweden) was elected as Chairman of the drafting group.

B. Attendance

5. Representatives of the following States members of the Commission on Human Rights attended the meetings of the working group, which were open to all members of the Commission: Algeria, Australia, Austria, Brazil, Bulgaria, Canada, Chile, China, Colombia, Cuba, Denmark, El Salvador, Ethiopia, France, Germany, Italy, Japan, Malaysia, Mexico, Netherlands, Pakistan, Peru, Philippines, Republic of Korea, Russian Federation, Ukraine, United Kingdom of Great Britain and Northern Ireland, the United States of America, Venezuela.

6. The following States non-members of the Commission on Human Rights, were represented by observers at the meetings of the working group: Albania, Argentina, Costa Rica, Cyprus, Czech Republic, Finland, Iraq, Israel, Lebanon, Libyan Arab Jamahiriya, Morocco, New Zealand, Nigeria, Norway, Poland, San Marino, Saudi Arabia, Senegal, Slovakia, Slovenia, South Africa, Spain, Sudan, Sweden, Syrian Arab Republic, Tunisia, Turkey, Uruguay.

7. The Holy See and Switzerland were also represented by observers.

8. The following non-governmental organizations were represented by observers at the meetings of the working group: Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International

Commission of Jurists, International Federation of ACAT (Action of Christians for the Abolition of Torture), International Federation of Human Rights Leagues, International Service for Human Rights, Women's International League for Peace and Freedom.

9. A representative of the International Committee of the Red Cross also attended the meeting as an observer.

C. Documentation

10. The working group had before it the following documents:

E/CN.4/1996/28 and Corr.1	Report of the working group to the Commission on Human Rights at its fifty-second session
E/CN.4/1996/WG.11/1	Provisional agenda
E/CN.4/1996/WG.11/WP.1	Working paper submitted by the Secretariat pursuant to Commission on Human Rights resolution 1996/37
E/CN.4/1996/WG.11/WP.2	Working paper submitted by the Secretariat
E/CN.4/1996/WG.11/Misc.1	Note from the Kuwaiti authorities
E/CN.4/1991/66	Letter dated 15 January 1991 from the Permanent Representative of Costa Rica to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights

The text of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and an explanatory note by the Council of Europe.

The text of the Inter-American Convention to Prevent and Punish Torture.

D. Organization of work

11. At its 1st meeting, on 14 October 1996, the working group adopted its agenda, contained in document E/CN.4/1996/WG.11/1.

12. The Chairman-Rapporteur made an opening statement, referring to the work accomplished during the previous four sessions of the working group. He said that important progress had been made towards achieving a final draft. He stressed that the purpose of the draft Optional Protocol would be to enhance dialogue with States through the principles of cooperation, confidentiality, impartiality and independence of the members of the proposed body. He referred to the generally accepted view that periodic visits to any place under the jurisdiction of the State concerned was the most effective method of strengthening protection of detainees against torture.

13. He invited the working group to embark on the second reading of the draft Optional Protocol by using last year's approach, namely establishing an open-ended drafting group, which would present to the working group in plenary meetings the outcome of its negotiations and agreed proposals. His proposal that Ms. Ann Marie Pennegard, the observer for Sweden, again chair the drafting group was unanimously approved. He referred to the documents which constituted the basis for discussion (see para. 10 above). It was further agreed that, for the benefit of an open and sincere debate, the proceedings of the drafting group would normally not be recorded. However, such recording could be carried out at the request of any participant or the Chairman of the drafting group.

14. The observer for Sweden stated that, in her view, discussion of the articles should occur in numerical order in accordance with normal practice. She also pointed out that occasionally it might prove difficult to finalize the text of an article without consideration of other closely linked articles which should then be considered together. She cited as an example articles 1 and 8. She put forth the idea that the instrument, in view of its distinctive character, its likely size and cost and the desirability of opening it to all States rather than merely to States parties to the Convention against Torture, might stand as a convention separate from the Convention against Torture instead of as an Optional Protocol thereto. She suggested that informal consultations be held during the session to this effect and that a plenary meeting be devoted to a discussion of that question at the end of the fifth session.

15. It was subsequently decided that, because of the link between articles 1 and 8, they should be considered simultaneously in the drafting group. It was also decided that generally the articles should be considered in numerical order. It was agreed that there should be consideration of the question of whether the instrument should stand as the Optional Protocol to the Convention against Torture or whether it should stand as a separate convention.

16. The observer for the Committee against Torture and the European Committee for the Prevention of Torture, was invited to address the working group on what he considered to be relevant issues at the beginning of the second reading. He stated that, in his view, it was crucial to describe clearly the mandate of the proposed body. He pointed out important differences between the Committee against Torture and a body such as the European Committee for the Prevention of Torture which conducted inspections, held its proceedings in camera and aimed at preventing torture. He felt that the mandate of the proposed body should be clearly distinguished from the mandate of the Committee against Torture in order to avoid confusion.

17. At the end of the 1st plenary meeting, the working group had the advantage of viewing an audio-visual presentation by Mr. Sorensen on the fundamental questions of how a visiting delegation should be composed, what factors should be investigated by the delegation and what constituted torture and inhuman and degrading treatment.

18. At the beginning of the 3rd plenary meeting, on 18 October 1996, Mr. Nigel S. Rodley, Special Rapporteur on the question of torture of the Commission on Human Rights, addressed the working group. He emphasized what

he considered were the essential elements to be contained in the instrument establishing the new body. These elements were that: the sub-committee must have a clear right to visit any State party, both periodically and on an ad hoc basis, and the State party must have a corresponding obligation to grant such access; a similar right and obligation must apply in respect of access to any place of detention identified or suspected as such by the sub-committee; meetings of the sub-committee with persons deprived of their liberty must be held in absolute confidentiality, with the possibility of follow-up to ensure the subsequent protection of such persons; the sub-committee must have the power to make its findings public should a State party fail to cooperate with the sub-committee to implement recommendations made by the sub-committee or if it otherwise should permit torture to continue; the sub-committee should be guaranteed the material and financial means to carry out its work effectively; no reservation that could adversely affect the above elements should be permissible; and the independence and impartiality of the work of the sub-committee must be fully guaranteed, including by ensuring that neither sub-committee members nor accompanying experts on a mission/visit to a State are nationals of the State in question.

19. The Special-Rapporteur also remarked that the proposed body would have a fundamentally preventive approach and in this was to be distinguished from the Committee against Torture. Accordingly, he felt that the roles of the two bodies should be kept separate. Indeed, he wondered whether it might avoid possible confusion in the respective roles of the two bodies if the new body were to be established under an instrument distinct from the Convention against Torture.

20. The representative of the Netherlands requested the Special Rapporteur's opinion on whether the legal text of the Optional Protocol should contain a specific reference to the work of the International Committee of the Red Cross (ICRC). The representative of Ethiopia raised the concern of the practical implications of separating the proposed body from the Convention against Torture in that it might prove difficult for the body to operate without having the legal basis of the Convention. The representative of Germany shared most of the concerns expressed by the representative of Ethiopia, adding that establishing a separate instrument might undermine efforts to make the Convention against Torture universal. The observer for Sweden asked for a description of how the Special Rapporteur carried out any visits under his mandate. The Chairman-Rapporteur questioned further whether the Special Rapporteur conducted follow-up visits as part of his work.

21. The Special Rapporteur stated that, without the elements he had mentioned concerning the sub-committee, the work of the ICRC could be seriously compromised with no compensating benefits. He added that it might be desirable to include a reference to the role of the ICRC in the text of the draft Optional Protocol. With respect to the concerns raised by the delegations of Ethiopia and Germany, he was of the opinion that a solution could be to include a preambular reference to relevant international standards, such as contained in the Convention against Torture. He cited as a precedent for this the reference in the European Convention for the Prevention of Torture to the standards set out in the Convention for the Protection of Human Rights and Fundamental Freedoms. In response to the questions posed as to the visits carried out by the Special Rapporteur, he said that examination

of prison conditions, as such, did not fall within his mandate. The primary reason the Special Rapporteur visited places where persons were incarcerated was to ascertain how detainees were treated, particularly in the interrogation process. He added that follow-up missions had not been a part of the work of the Special Rapporteur.

II. CONSIDERATION AND DRAFTING OF PARAGRAPHS AND ARTICLES

A. Articles 1 and 8

22. The 2nd plenary meeting began on 17 October 1996, following the decision of the drafting group to suspend the drafting process on articles 1 and 8.

23. The Chairman-Rapporteur of the working group commented on the work of the drafting group on articles 1 and 8. He thanked all delegations and the Chairman of the drafting group for their intense efforts in negotiating with a view to finding a consensus on articles 1 and 8. Despite the fact that the drafting process on those articles had been suspended, he noted with appreciation that three days of analysis, discussion and negotiation had taken place. He noted that there were differences between the delegations on the question of the consent of States to receive missions. For some States, ratification of the new instrument would in itself represent prior consent to any mission. For others, consent would have to be expressed on each occasion and the new instrument should regulate the forms of this consent. He recalled that the purpose of the Optional Protocol was the prevention of torture. This was to be achieved through the establishment of dialogue between the authorities of the State party and the sub-committee under the guidance of principles of cooperation and confidentiality. He proposed that the working group begin consideration of the subsequent articles.

24. A debate on a procedural question followed the Chairman-Rapporteur's comments. Some delegations were of the view that the plenary meeting should hear a debate on the reasons for the suspension of work on articles 1 and 8 by the drafting group. Other delegations considered that such a debate could hinder the informal negotiations taking place on those articles. Other delegations pointed out that to start the discussion on other articles might assist progress on articles 1 and 8.

25. The Chairman-Rapporteur ruled that the Chairman of the drafting group should, in the time remaining in this plenary meeting, present her report on the work done and that delegations which wished to make statements and comments concerning this work should do so at the next plenary meeting. He hoped that this ruling would provide interested delegations with the opportunity to continue their informal negotiations on those articles before the positions of the different delegations were debated in the plenary meeting.

26. The Chairman of the drafting group reported on the last six meetings of the drafting group. She outlined the method of work of the drafting group which had been agreed to by the working group at its 1st plenary meeting. This method was to commence with a consideration of articles 1 and 8 together and then to proceed with consideration of the articles in numerical order and, when necessary, to consider together articles which were closely linked. The

Chairman was entrusted with the role of drafting consolidated proposals in order to allow the drafting group to focus on a single text and move towards its adoption. After fruitful debate and the submission of many proposals, the Chairman had been able to present consolidated texts of article 1, paragraphs 1 and 2, and article 8, paragraphs 1 and 2. It was clear to her that several delegations felt that those consolidated texts still lacked essential elements. Those elements stemmed from the question of the requirement of the consent of States before any mission of the sub-committee and the question of how the fundamental principles contained in the Charter of the United Nations, in particular the principles of non-intervention and sovereignty of States, were to be reflected in the Optional Protocol. She mentioned that it had been suggested that the latter concern might be addressed by their inclusion in the preamble to the Optional Protocol.

27. The Chairman of the drafting group read aloud the texts of the consolidated proposed articles 1 and 8 as they stood at the suspension of the consideration of the drafting group on these articles (see annex II for the text of article 1, paras. 1 and 2, and article 8, paras. 1 and 2).

28. At the 3rd plenary meeting on 18 October 1996, the representative of the Netherlands made a general statement in which he emphasized that it was important to recognize that there were differences of opinion on issues of principle between delegations. He felt that by stating the differing positions, the issues might be clarified and efforts to arrive at a precise legal text would be assisted. One such difficult issue was whether ratification or accession to the Optional Protocol represented prior consent to any mission of, and any visit by, the sub-committee or whether consent would be needed for each and every mission. His delegation supported the former view. However, he acknowledged that consultations concerning the practical arrangements of a mission would have to take place. At the same time, he pointed out that even delegations that wished to preserve a requirement of express prior consent to each mission would not, after ratifying the Optional Protocol, withhold that consent lightly. There was a need to continue in efforts to narrow these differences by negotiating in good faith, while recognizing the possibility that a final text that all could agree upon might not be found.

29. The delegations of Australia, Brazil, Canada, Chile, Denmark, Ethiopia, France, Germany, South Africa, Switzerland and Uruguay echoed the view of the representative of the Netherlands that ratification of the instrument would signify in itself the consent of a State party to receive missions. The representative of Canada opposed the drafting of a protocol which would establish an expensive body which would still require the agreement of a State party before it could undertake a mission. The representatives of Chile and Denmark emphasized that the aim of the Optional Protocol was to strengthen mechanisms for the prevention of torture. The representative of Ethiopia noted, however, that in order for the system of missions to be acceptable, States would need, in a context of cooperation and dialogue, a substantial input into the performance and outcome of such missions. This issue should be addressed in relation to a number of articles, bearing in mind General Assembly resolution 40/120 of December 1986 which required, inter alia, that international instruments be realistic, effective, and attract broad international support.

30. The observer for the Association for the Prevention of Torture read a statement on behalf of itself and the following non-governmental organizations: Amnesty International; International Commission of Jurists; International Federation of ACAT; International Service for Human Rights; International Federation of Human Rights Leagues, later supported by Human Rights Watch and the Women's International League for Peace and Freedom. In their view, the entire purpose and the functions of the Optional Protocol would be undermined if a requirement of prior consent to receive missions were included because this would permit States parties to avoid obligations under the instrument. They also felt that such a requirement would result in negotiation for each and every visit which would entail an inefficient use of resources and expertise.

31. The representative of Mexico stated that the effectiveness of the sub-committee in preventing torture depended on the degree of cooperation between it and the State party. His delegation was of the view that the prior consent of the State party concerned was required for each mission and it would oppose the sub-committee having a broad entitlement to carry out visits at any time to any place. He stated that the texts of articles 1 and 8 presented by the Chairman of the drafting group did not reflect Mexico's position because fundamental principles had not been included. As no consensus on them had been reached, Mexico regarded the text of the first reading as remaining valid.

32. The representative of Cuba said that she shared some of the concerns of the representative of Mexico. In the opinion of her delegation, any draft proposals for the articles of the Optional Protocol must reflect all points of view. She felt that, thus far, the conflicting views of some delegations had not been reflected in the consolidated proposals. She also felt that the retention of some text in square brackets would not mean that no progress had been achieved.

33. The observer for Uruguay felt that, in the second reading, it would be most beneficial to have the views of all delegations reflected in some way in the final report rather than in the draft text of the new instrument; but there was still room to reflect in the draft text of the instrument several reasonable concerns, for example, the item on cooperation between the sub-committee and the State party before a mission took place, which was being considered under paragraph 3 of article 8.

34. The representative of China, while recognizing the importance of the sub-committee being allowed to exercise its functions on the territory of a State party and agreeing that it would enjoy certain privileges, felt that the principles of non-intervention and prior consent were also important and must have their place in the text. His delegation was further of the view that the principle of universality applied in the drafting of the Optional Protocol.

35. The observer for South Africa expressed the view, endorsed by the representative of Germany, that upholding the principle of universality was contradictory to maintaining a position that a State could reserve its consent to receiving a mission. The representative of Germany reminded the delegations that the principle of confidentiality would be an integral part of the Optional Protocol.

36. The representative of the Republic of Korea stated that her delegation did not believe that essential differences existed between the various delegations, given that they had a common aim of prevention of torture and all believed in the principle of sovereignty of States.

37. The representative of Canada reported on the results of informal negotiations between a number of delegations on paragraph 3 of article 8. She stated that these delegations had identified a number of elements which they required in this paragraph which were incorporated in a text which read as follows:

> "8.3 Without prejudice to article 12 and in a spirit of cooperation and dialogue, the sub-committee and the State party concerned shall, if either of them so requests, enter into consultations with a view to mutually agreeing without delay on the practical arrangements for the mission."

38. The representative of Australia stated that, although his delegation would prefer article 8 to contain only the first two paragraphs of the consolidated proposal, it would be prepared to accept the text for paragraph 3 presented by the delegation of Canada provided that it was clearly linked to article 14, paragraph 4.

39. At the 4th plenary meeting, on 18 October 1996, the observers from Argentina, Spain and Cyprus joined the delegation of the Netherlands and other delegations in stating that ratification of the Optional Protocol represented prior consent to missions. The observer for Argentina said that, in order to achieve universal acceptance of the Optional Protocol and its operation, it was necessary to define more clearly its purpose, scope, and the types of missions that would be carried out. He mentioned that, during the drafting negotiations, four types of missions had been identified: regular missions, follow-up missions, missions carried out at the request of the State party for the purpose of assistance, and emergency missions undertaken with the aim of verification. Some missions would be carried out within the framework of cooperation, while others would be undertaken with the purpose of verifying that the obligations of States parties had been fulfilled. The observer for Spain pointed out that by the act of ratification of a treaty, a State relinquished a part of its sovereignty. He added that under article 19 of the draft Optional Protocol a State would always have the opportunity to denounce its acceptance of the obligations of the treaty.

40. The representatives of Austria, Brazil, France, Italy, the United Kingdom of Great Britain and Northern Ireland and the United States of America expressed their support for the consolidated proposed texts of articles 1 and 8 and for the earlier interventions by the delegations of the Netherlands and South Africa. The representatives of Austria and the United States of America stressed the very high cost of the proposed body, which could not be justified for visits that would not be mandatory.

41. The representative of El Salvador considered that some of the difficulties encountered in attempting to find a consensus text were due to the fact that the draft Optional Protocol aimed to create a mechanism that was

without precedent in the United Nations system. She expressed the opinion that during the previous days of negotiations all delegations had made some concessions and she encouraged them to pursue their efforts.

42. The observer for Poland saw a fundamental contradiction between prior consent and prevention. He expressed the concern that continued resort to the principles of non-intervention and consent of States would block the progress that the delegations had been seeking.

43. The representative of Japan made observations on the consolidated proposed articles. Pointing out that the places which could be visited by the sub-committee should be defined as places under the auspices of the public authorities, she stated that the Government of Japan would make a reservation to article 1, paragraph 1, if the present text were to be adopted at the plenary. Regarding article 8, paragraph 3, she stressed that, without the conducting of consultations and the achievement of mutual agreement, it would be impossible for the sub-committee to carry out its missions effectively and expressed the wish that the working group should make further efforts to elaborate a consensus text.

44. The observer for the ICRC explained that the ICRC observed a uniform method when carrying out a visit to any country, regardless of the circumstances. This standardization maximized their ability to obtain the best possible information using a completely impartial approach.

45. At the beginning of the 6th plenary meeting, on 25 October 1996, the Chairman of the drafting group in her presentation of her report to the plenary meeting, stated that agreement could not be reached with regard to the consolidated proposed articles 1, paragraphs 1 and 2, and 8, paragraphs 1 and 2, as she had mentioned earlier (see para. 27), nor concerning a new paragraph 3 of article 8. She stated that the drafting group had decided to place the texts of these articles in annex II of the report of the Working Group to the Commission to be considered as "Text of the articles which constitute the basis for future work".

46. The representative of China stated that the articles reproduced in annex II could be used as the basis for future work but that, in terms of validity, the text of articles 1 and 8, as adopted as the outcome of the first reading, should still be recognized as a major foundation for such future work. The representative of Mexico and the observers for the Syrian Arab Republic and Nigeria, while recognizing that the text of articles 1 and 8, as contained in annex II, constituted the basis for future work on these articles, stated that certain essential elements were still lacking from the text of these articles.

47. The representative of Canada stated that her delegation was willing to accept on a consensus basis the text of articles 1 and 8, as contained in annex II. She noted that although consensus had not been reached on these articles, the consolidated text represented the result of considerable work and that it had been agreed that this text would constitute the basis for future work. This statement was supported by the delegations of Australia,

Switzerland, Chile, El Salvador, the United Kingdom, Finland and Costa Rica as well as by: the International Commission of Jurists and the Association for the Prevention of Torture.

48. The representative of Denmark stated that in his view articles 1 and 8 constituted the essential elements in the establishment of an effective mechanism for the prevention of torture. He stated his delegation's willingness to accept the consolidated articles as they stood and expressed the wish that other delegations would either recognize the elements necessary in establishing such a body or consider not joining the Optional Protocol. The observer for Amnesty International stated that the general support for a protocol to the Convention Against Torture expressed by States must be translated into specific support for strong elements to be incorporated into articles 1 and 8. The observer for the International Commission of Jurists stated that the final text of articles 1 and 8 must in no way compromise the obligation of States parties to receive visits to any place in any territory under their jurisdiction.

B. Articles 2, 3, 4, 5 and new articles 6 and 7

49. At the beginning of the 5th plenary meeting, on 21 October 1996, the Chairman-Rapporteur called for comments on articles 2, 3, 4 and 5 as adopted as the outcome of the first reading.

50. The delegations of Mexico, Sweden and Switzerland made reference to their comments on the text of these articles contained in documents E/CN.4/1996/WG.11/WP.1 and 2.

51. The representative of Denmark made a general statement in which he stressed the necessity for the independence, impartiality and competence of those carrying out missions. In this connection, he stated that the sub-committee, for the purpose of any mission undertaken by it, should have the ability to choose additional experts to assist it.

52. The observer for Amnesty International said that the quality and independence of the proposed body would determine its effectiveness. She felt that there was a possible contradiction between, on the one hand, the desire to appoint the best possible members for the position and, on the other hand, the appointment of members by States parties who might be influenced by political considerations. Accordingly, she suggested that the Committee against Torture should play a role in the appointment of members of the proposed body or that other methods of providing independent experts be explored.

53. With respect to article 2, the delegations of Mexico, the Russian Federation and Cuba expressed the view that the draft Optional Protocol should clearly establish the link between the Committee against Torture and the sub-committee. Accordingly, they wished to see the phrases, "of the Committee against Torture" and "which shall carry out the functions laid down in the present Protocol" retained and the square brackets around them removed. The representative of Japan held a differing view, stating that the sub-committee should be independent of the Committee against Torture and

she proposed deleting the reference to the Committee against Torture in article 2. She also suggested that the proposed body be called the "Committee for the Prevention of Torture".

54. With respect to article 3, the delegations of Mexico and Cuba expressed the view that the phrase "the competent national authorities of" should be retained and the square brackets around it removed, while deleting the word "national". The representative of Mexico would add the principle of objectivity to the principles of confidentiality and impartiality.

55. With respect to article 4, the delegation of Mexico expressed the view that the sub-committee should be comprised of the same number as, or fewer members than, the Committee against Torture. Similarly, the representative of the Philippines stated that the sub-committee should comprise no more than 10 members since it should not have more members than its parent body. The representative of Japan felt that the body, like the Committee against Torture, should comprise 10 members. The delegations of the Republic of Korea, Canada, Australia and Cuba recommended that the number of members of the sub-committee should be linked to the number of States parties to the Optional Protocol. The representative of Japan expressed the view that the wording of article 4, paragraph 2, was too detailed to allow suitable candidates for the proposed body to be found and suggested phrasing along the lines of article 4, paragraph 2, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. She proposed the following text: "The members of the sub-committee shall be chosen from among persons of high moral character, known for their competence in the field of human rights or having proven professional experience in the field of prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty." The representative of Canada pointed out that the wording of article 4, paragraph 2, was not in square brackets and further pointed out that, in her view, the wording was already sufficiently flexible to allow suitable candidates to be found.

56. With respect to article 5, paragraph 1 (a), the delegations of Brazil and Cuba and the observer for Nigeria stated that the State party should nominate only its own nationals as members of the sub-committee. The deletion of article 5, paragraph 1 (b), was proposed by the representative of Brazil on the grounds that it would be tantamount to investing in the Committee against Torture the power of veto over the election of members. With respect to article 5, paragraph 1 (c), the delegations of Brazil, Japan, the Philippines and Nigeria expressed the view that members of the sub-committee should be elected by States parties. The representative of Brazil added that in the event that a substitute member should be required under article 5, paragraph 5, that member should be appointed by the State party concerned. In contrast to the view of those delegations, the representative of the Republic of Korea felt that the members of the sub-committee should be elected by the members of the Committee against Torture.

57. Several delegations made comments of a more general nature on article 5. The representative of China stated that the method of election of the proposed body should adhere to the general procedures followed by other human rights bodies. Accordingly, he felt that it was not appropriate for the Committee against Torture to be involved in the composition of the sub-committee. The

representative of the Philippines disapproved of the reference in article 5, paragraph 4, to "different forms of civilization". She expressed the view that the wording was discriminatory and that humanity was progressing as one.

58. At the beginning of the 6th plenary meeting, on 25 October 1996, the Chairman-Rapporteur called on the Chairman of the drafting group to present her report on articles 2 to 5 and on the new articles 6 and 7.

59. The Chairman of the drafting group then reported on the last seven meetings of the drafting group and read the texts of these articles to the plenary meeting (see annex I). She said that hard work had been done in an atmosphere where many proposals had been made and discussed. She also stated that a large number of delegations had relinquished their original positions in the interest of arriving at consolidated consensus texts. She explained that her report was a summary of the discussions held in the drafting group and that, as such, it would not reflect the viewpoints of all delegations.

60. With regard to article 2, she reported that there had been differing views as to the relationship between the body to be established and the Committee against Torture. She stated that the drafting group had decided to reflect this divergence of views in a footnote to be presented to the plenary meeting for adoption. She further elaborated on the importance of this issue by stating that the relationship of the two bodies to each other would have implications for several articles in the draft Optional Protocol. She had suggested, and the working group agreed, that informal consultations should be held during the session and that a plenary meeting be devoted to a discussion of that question at the close of the session. However, the working group had run out of time and never formally debated the issue.

61. Regarding article 3, the Chairman of the drafting group said that a substantial amount of time had been devoted to discussions on the main principles to be contained in the article, namely those relating to the relationship between the sub-committee and the State party as well as the principles guiding the work of the sub-committee. She stated that a lengthy debate had taken place on how the important purposes and principles of the Charter of the United Nations were to be reflected. She also said that another debate had centred on whether the principle of non-selectivity should be included in the text, but that the drafting group had agreed to include a non-exhaustive list of principles in the article as contained in annex I.

62. With respect to article 4, the Chairman of the drafting group referred to the debate on the number of members of which the sub-committee should consist. She reported that an initial membership of 10 had been agreed upon on the basis of a proposal of one delegation, although the drafting group had deliberated for some time on whether the number of members should depend on the number of accessions to the Optional Protocol. After the fiftieth accession to the Protocol, the drafting group had agreed that the number of members of the sub-committee should increase to 25. She added that one delegation had proposed an amendment to the text of paragraph 2, but that it had agreed to making its position known in a plenary meeting. Subsequently, the texts of paragraphs 2, 3 and 4 of article 4 were presented as they appeared at the outcome of the first reading.

63. With respect to article 5, the Chairman of the drafting group stated that it had considered whether to allow States parties to nominate more than one candidate. Another issue debated had been whether States parties would be allowed to nominate nationals of other States parties. She stated that the outcome was the requirement that at least one of two nominees of a State party should be a national of the nominating State.

64. With respect to the new article 6, the Chairman of the drafting group stated that several of the paragraphs of this article had been moved from the text of article 5 as it appeared in the annex to document E/CN.4/1996/28. Concerning paragraph 4, she referred to discussions in the drafting group on whether the words "different forms of civilization" should be deleted. She reported that, due to the willingness of several delegations to show flexibility, the drafting group had finally agreed to retain these words. She then introduced paragraph 6, explaining that it addresses the implications of the decision of the drafting group to enable States parties to nominate non-nationals. It would apply when two nationals of a State party had become eligible, as a result of the voting by the States parties, to serve on the sub-committee. She also clarified that it had been decided to reflect differing views on the placement of the substance of this paragraph by means of a note to the present article.

65. With respect to the new article 7, the Chairman of the drafting group stated that the agreed text had been adopted by the drafting group to be presented to the plenary meeting, despite there having been some delegations with different views. She explained that they would have preferred to establish a more transparent method of replacing a member of the sub-committee who could no longer perform his or her duties before expiry of term, but that all delegations had finally agreed to the text of article 7 as contained in annex I.

66. The Chairman-Rapporteur of the working group thanked the observer from Sweden, the Chairman of the drafting group, for her efforts, stating that her skill, along with the intense work done by the delegations of the drafting group, had permitted great progress on these articles. He proposed that the working group should adopt as the result of the second reading the text of articles 2, 3, 4, 5, 6 and 7 as contained in annex I, making clear that articles 5, 6 and 7 were the result of the division of article 5 of the first reading. It was so decided.

67. The Chairman-Rapporteur, while noting that the use of footnotes in the texts demonstrated that full consensus had not yet been reached, stated that there was consensus that the aim of the Protocol was the prevention of torture. This aim was to be achieved through reliance on the principles of cooperation between States, confidentiality, independence, impartiality, universality and effectiveness. He stated his confidence that a new dynamic instrument of international law would be the result of this work and would attract the broad support of the international community.

68. The representative of Italy made a statement in relation to article 6, paragraph 4. She expressed her firm opinion that the reference in this paragraph to "the representation of different forms of civilization" was unsuitable for the following reasons. Firstly, the reference was redundant in

view of the inclusion of the requirement for equitable geographical distribution. Secondly, she felt that, in evaluating a specific candidate, it would be impossible to enter into a debate concerning the issue of his or her "civilization", since this would inevitably entail discussions on matters like individual beliefs, ethnic origin, social traditions and religion. Thirdly, she affirmed that torture could not be assessed differently on the basis of different forms of civilization. In this connection, she added that, as far as the prevention of torture was concerned, there was only one civilization: human civilization. She pointed out that the Convention against Torture, to which this instrument was to be the Optional Protocol, did not make any distinction as to different civilizations in the appointment of its members.

69. The observer for South Africa, adding his support, stated that he felt that the reference to civilization could be interpreted as placing peoples on different levels, referring to the suffering experienced in his own country. The delegations of France, Germany, Chile, the United States of America, Sweden, Switzerland, Spain, Australia, Colombia, Finland, the United Kingdom, the Philippines, Costa Rica, the Netherlands and the non-governmental organizations, the International Commission of Jurists, Amnesty International and the Association for the Prevention of Torture supported the intervention of the representatives of Italy and South Africa.

70. Chile pointed out that he understood that the particular formula "different forms of civilization and legal systems" was retained in order to achieve consensus. However, he considered those words unnecessary. In his view, the main qualities of members of the sub-committee should be competence and other qualities clearly stipulated in article 4, paragraph 2.

71. The representative of Canada stated that her delegation wished to associate itself with the comments of the delegation of Chile and indicated that her delegation had not opposed the use of the phrase "the representation of different forms of civilization" in article 6, paragraph 4, in the drafting group as the discussion had shown that it was important for some delegations. However, she wished to state clearly her delegation's view that the use of "civilization" in that paragraph referred only to the selection of members of the sub-committee and in no way suggested that torture could be viewed differently through the lens of culture or "of different forms of civilization", or that its use for the purposes of selection could affect the work of the sub-committee. This statement was supported by the delegations of Brazil, Chile, Finland, the Netherlands, Venezuela, Switzerland and Amnesty International.

72. The delegation of Colombia considered that the reference in article 6, paragraph 4 "the representation of different forms of civilization" was not only unnecessary but also constituted a dangerous precedent in the universal conception of the human rights, considering that gross human rights violations often took place using as a pretext the necessity of defending particular forms of civilization. Approaches implying partial acceptance or interpretation of such rights would mean moving backwards, and this could not be accepted.

73. The representative of Japan stated that the new text of article 2 was adopted by the working group on the understanding that the question of the relationship between the sub-committee and the Committee against Torture would be discussed at future sessions of this working group.

74. The representative of Cuba expressed regret that the principle of non-selectivity had not been included in article 3. She felt it might not be understood from the term "universality" that the future work of the sub-committee should extend to the entire membership of the Optional Protocol on an equal basis. She was also in favour of reflecting in the draft Optional Protocol the principle of prior consent of the State party concerned to each separate mission. In her opinion, it should be a guiding principle in relations between the sub-committee and States parties.

75. The representative of the Netherlands was of the view that in new article 7, reference should be made to article 5 in addition to article 4. He expressed the wish that the working group revert to this issue at its sixth session.

76. The representative of Denmark stressed the need to finalize as soon as possible the text of the Optional Protocol to bring into existence an effective mechanism for the prevention of torture. The representative of El Salvador emphasized that the new instrument would be based on the principles of cooperation and confidentiality. The observer from Finland also stressed the importance of cooperation between the sub-committee, the States parties and the Committee against Torture and she insisted on the need for the Optional Protocol to be effective.

77. The observer for Amnesty International echoed the views of the representative of Denmark, recalling that her organization received reports of torture from more than 100 countries in all regions of the world every year. The working group should draft a strong Optional Protocol and maximize its use of time. The observer for the Association for the Prevention of Torture insisted that it was necessary that together the members of the sub-committee should not only represent the different fields of competence, geographical regions and legal systems, but that they should also be efficient, independent and impartial.

III. FUTURE WORK

78. At its 7th plenary meeting, on 25 October 1996, the working group discussed the issue of how its work could best be continued.

79. The observer for Switzerland, referring to the call by the World Conference on Human Rights for the early adoption of the Optional Protocol to the Convention against Torture, proposed submitting a recommendation to the Commission on Human Rights that it convene two sessions of the working group next year.

80. The representatives of China and Cuba and the observer for Nigeria, referring to the financial difficulties of the United Nations and necessity of giving due regard to the work of other working groups of the Commission, were in favour of convening only one session of the group in 1997. The

representative of Japan, expressing an objection to the holding of two sessions of two weeks' duration each next year, called for improvement of the working method of the working group by better utilization of time at the next session.

81. The delegation of the United Kingdom of Great Britain and Northern Ireland suggested requesting the Commission to consider the possibility of convening two sessions of the working group. The proposals made by the observer for Switzerland and the representative of the United Kingdom were supported by the representatives of Costa Rica and South Africa.

82. The working group considered that it would be helpful if the Secretariat, to assist the working group at its next session, could prepare a working paper containing comments and suggestions made by Governments, United Nations bodies, and non-governmental organizations.

IV. ADOPTION OF THE REPORT

83. In compliance with established practice, the present report describes the main issues that were raised in the debate at the plenary meetings of the working group.

84. The report was adopted at the 8th plenary meeting of the working group, on .. March or April 1997.

Annex I

TEXT OF THE ARTICLES WHICH CONSTITUTE THE OUTCOME OF THE SECOND READING

Article 2 1/

There shall be established a Sub-Committee for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture which shall carry out the functions laid down in the present Protocol (hereinafter referred to as the Sub-Committee); the Sub-Committee shall be responsible for organizing missions to the States parties to the present Protocol for the purposes stated in article 1.

Article 3

1. In the application of this Protocol the Sub-Committee and the State party concerned shall cooperate with each other.

2. The Sub-Committee shall conduct its work within the framework of the Charter of the United Nations and be guided by the purposes and principles therein.

3. The Sub-Committee shall also be guided by the principles of confidentiality, impartiality, universality and objectivity.

Article 4

1. The Sub-Committee shall consist of 10 members. After the fiftieth accession to the present Protocol, the number of members of the Sub-Committee shall increase to 25.

2. The members of the Sub-Committee shall be chosen from among persons of high moral character, having proven professional experience in the field of the administration of justice, in particular in criminal law, prison or police administration or in the various medical fields relevant to the treatment of persons deprived of their liberty or in the field of human rights.

3. No two members of the Sub-Committee may be nationals of the same State.

4. The members of the Sub-Committee shall serve in their individual capacity, shall be independent and impartial and shall be available to serve the Sub-Committee effectively.

1/ There was a divergence of views in the working group as to the relationship between the new body to be established and the Committee against Torture. A number of delegations supported the view that the new body should be a sub-committee of the Committee against Torture, while some delegations proposed that it should be a body separate from the Committee against Torture.

Article 5

1. Each State party may nominate, in accordance with paragraph 2, up to two candidates possessing the qualifications and meeting the requirements set out in article 4, and in doing so shall provide detailed information on the qualifications of the nominees.

2. (a) Nominees of the Sub-Committee shall have the nationality of a State party to the present Protocol.

(b) At least one of the two candidates shall have the nationality of the nominating State party.

(c) Not more than two nationals of a State party shall be nominated.

(d) Before a State party nominates a national of another State party, it shall seek and obtain the written consent of that State party.

3. At least five months before the date of the meeting of the States parties during which the elections will be held, the Secretary-General of the United Nations shall address a letter to the States parties inviting them to submit their nominations within three months. The Secretary-General shall submit a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them.

Article 6

The members of the Sub-Committee shall be elected in the following manner:

1. Elections of the members of the Sub-Committee shall be held at biennial meetings of States parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States parties shall constitute a quorum, the persons elected to the Sub-Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States parties present and voting.

2. The initial election shall be held no later than six months after the date of entry into force of the present Protocol.

3. The States parties shall elect the members of the Sub-Committee by secret ballot.

4. In the election of the members of the Sub-Committee, primary consideration shall be given to the fulfilment of the requirements and criteria of article 4. Furthermore, due consideration shall be given to a proper balance among the various fields of competence referred to in article 4, to equitable geographical distribution of membership and to the representation of different forms of civilization and legal systems of the States parties.

5. Consideration shall also be given to balanced representation of women and men on the basis of the principles of equality and non-discrimination.

6*. If, during the election process, two nationals of a State party have become eligible to serve as members of the Sub-Committee, the membership of the Sub-Committee shall be resolved in the following manner in conformity with article 4, paragraph 3:

(a) The candidate receiving the higher number of votes shall serve as the member of the Sub-Committee.

(b) Where the nationals have received the same number of votes, the following procedure applies:

(i) Where only one has been nominated by the State party of which he or she is a national, that national shall serve as the member of the Sub-Committee;

(ii) Where both nationals have been nominated by the State party of which they are nationals, a separate vote by secret ballot shall be held to determine which national shall be the member;

(iii) Where neither national has been nominated by the State party of which he or she is a national, a separate vote by secret ballot shall be held to determine which national shall be the member.

Article 7

If a member of the Sub-Committee dies or resigns or for any other cause can no longer perform the member's Sub-Committee duties, the State party which nominated the member shall nominate another eligible person possessing the qualifications and meeting the requirements set out in article 4, taking into account the need for a proper balance among the various fields of competence, to serve until the next meeting of the States parties, subject to approval of the majority of the States parties. The approval shall be considered given unless half or more of the States parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

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* It was proposed that paragraph 6 be embodied in the rules of procedure of meetings of the States parties, should they be elaborated. Another proposal was that paragraph 6 be annexed to the present Protocol.

Annex II

TEXT OF THE ARTICLES WHICH CONSTITUTE THE BASIS FOR FUTURE WORK

Article 1

1. A State party to the present Protocol shall permit visits in accordance with this Protocol to any place in any territory under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are held or may be held.

2. The object of the visits shall be to examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from, and to suggesting measures for the prevention of, torture and other cruel, inhuman or degrading treatment or punishment in accordance with applicable international law and relevant international standards.

Article 8

1. The Sub-Committee shall establish, on the basis of a transparent and impartial procedure, a programme of regular missions to each State party. It shall also undertake such other missions, including for the purposes of follow-up, as appear to it to be required in the circumstances with a view to furthering the aims of this Protocol.

2. In accordance with the principles set out in article 3, the Sub-Committee shall send a written notification to the Government of the State party concerned of its intention to organize a mission, followed by a list of places to be visited and the composition of the delegation. The Sub-Committee may also visit other places as needed during its mission.

3. Before a mission is carried out, the Sub-Committee and the State party concerned shall, if either of them so requests, enter into consultations with a view to agreeing without delay on the practical arrangements for the mission. Such consultations on the practical arrangements for the mission may not include negotiations on the obligations of a State party under articles 1 and 12.